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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

No. _____

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DENNIS MCCABE

Petitioner-Appellant

- against -

COMMISSIONER OF INTERNAL REVENUE

Respondent-Appellee

----------X

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1) WHETHER PERSONAL CHOICE OF RESIDENCE NEGATES THE DEDUCTABILITY OF ADDITIONAL COMMUTING COSTS WHICH WERE PREVIOUSLY DEDUCTABLE PURSUANT TO THE COURT'S HOLDING IN FAUSNER V. COMMISSIONER?

2) WHETHER ARMED POLICE OFFICERS WHO MUST TRAVEL AN INDIRECT ROUTE TO WORK AS A RESULT OF AN ADJACENT STATE'S PROHIBITION AGAINST POSSESSION OR TRANSPORTATION OF WEAPONS, CAN DEDUCT THE ADDITIONAL COMMUTING EXPENSE?

3) WHETHER A WEAPON CAN BE CONSIDERED A REQUIRED TOOL FOR PURPOSES OF SECTION 162 OF THE INTERNAL REVENUE CODE?

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SUPREME COURT OF THE UNITED STATES
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DENNIS MCCABE

Petitioner-Appellant

- against -

COMMISSIONER OF INTERNAL REVENUE No._____

Respondent-Appellee

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The petitioner Dennis McCabe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 14, 1982.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix attached hereto. The opinion of the United States Tax Court is reported at 76 T.C. 876 (1981) and appears in the Appendix hereto affixed.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 14, 1982. This petition for certiorari was filed within 90 days of that date and is timely. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

SECTION 162 TRADE OR BUSINESS EXPENSES

(a) IN GENERAL - There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) travelling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business[1] AND

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

STATEMENT OF THE CASE

This case involves the question of whether additional commuting expenses incurred by a New York City Police Officer who was prohibited from travelling through the State of New Jersey with his firearm, are deductable business expenses pursuant to Internal Revenue Code Section 162 and Revenue Ruling 75-380.

New York City Police Department regulations required that all police officers be armed at all times while within the City of New York. Petitioner, a New York City Police Officer, resided in Suffern, New York, a suburb north of New York City and adjacent to New Jersey. The most direct and least costly route of travel by either car or public transportation between petitioner's residence and place of employment is through the State of New Jersey. All parties involved in this litigation stipulated that New Jersey law prohibits petitioner and other similarly situated New York City police officers from carrying their service

revolvers through New Jersey on a daily basis. It was further stipulated that New Jersey authorities will only issue gun permits to persons who individually establish urgent need to possess a gun within the State of New Jersey.

Petitioner maintains and the Tax Court found as fact[1] that petitioner would have utilized less expensive means of commuting to work but for the New Jersey prohibition which precluded petitioner from carrying his service revolver on either public or private transportation through the State of New Jersey.

Petitioner because of the New Jersey

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See McCabe v. Commissioner of Internal Revenue 76 T.C. 876, 881 (1981) "we accordingly find as a fact that petitioner would have commuted to work by using the bus or subway but for the necessity of carrying his service revolver."

prohibition was forced to travel to work in his private car entirely on New York roads. Travelling entirely through New York caused petitioner to incur additional expenses consisting of an additional(.50) fifty cent toll and an additional commuting distance of thirty miles each day.

Petitioner on his 1976 tax return claimed a deduction for the cost of his employer's requirement that he be armed at all times within the City of New York. The Commissioner disallowed the deduction and petitioner instituted the present litigation.

The majority of the Tax Court concurred to an opinion written by Judge Raum. The Court found as fact that petitioner did incur additional expenses because of his employer's requirement that he carry his service revolver but disallowed the deduction because the expenses were related to additional commuting costs which according to the majority's reasoning were personal in nature and therefore nondeductable.

In a concurring opinion Judge Scott

expressed the view that additional expenses for carrying tools would be deductible only if the expenses were in the nature of trailer rental costs.

Judge Fay and Sterrett wrote dissenting, opinions which stated that petitioner's additional expenses were incurred as a result of his employer's requirement that he be armed and thus were deductible business expenses. Judge Wiles and Wilbur joined Judge Strerrett's dissent.

Petitioner appealed the Tax Court decision to the United States Court of Appeals Second Circuit. Circuit Judge Cardamone joined by District Judge Holden [2], affirmed the majority opinion of the tax court. The Court noted the exception to the general rule against deducting commuting expenses which appears in Fausner v. Commissioner [3] but held that petitioner could

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[2] Judge Holden, Chief Judge of the United States District Court for the District of Vermont was sitting by designation.

[3] Fausner v. Commissioner, 413 U.S. 838 (1973).

not deduct his added cost because he chose to live in the suburbs and thus burden himself with additional expenses. Judge Cardamone stated that since the Supreme Court had "provided little or no guidance as [to] what kind of circumstances should trigger "an allocation of expenses, there was no basis upon which to find petitioner's expenses deductible. The Court held that petitioner's expenses could not be "ordinary and necessary" nor related to his employer's requirement that he carry a gun, when the petitioner chose to live outside New York City.

Circuit Judge Meskill in his dissent found that petitioner incurred additional expenses by circumventing New Jersey because of his employer's requirement that he carry his firearm at all times while within the City of New York. The dissent held that these additional expenses should be allocated as business expenses under Fausner[4] and pursuant to Rev. Rul. 75-380 .

Judge Meskill in his dissent pointed out that the majority's reasoning would render meaningless almost all Fausner-type deductions since a taxpayer can always reduce or eliminate excess commuting costs by living closer to his work location. The dissent concluded that to the extent petitioner's change in route of travel was necessary to satisfy his employer's requirement that he be armed, he was entitled to a deduction under 162(a) of the Internal Revenue Code.

Petitioner now prays that this Court grant relief from the adverse decision of the United States Court of Appeals for the Second Circuit.

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[4] See Rev. Rul. 75-380 attached hereto in the Appendix and which states that additional commuting expenses incurred for transporting work implements to and from work are deductible as ordinary and necessary business expenses.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DECISION WOULD RENDER MEANINGLESS AND ELIMINATE ALL FAUSNER-TYPE DEDUCTIONS AND CREATES CONFUSION AND INDECISION IN THE APPLICATION OF THE LAW GOVERNING SUCH DEDUCTIONS

The Court in Fausner v. Commissioner[1] held that expenses incurred by happenstance that a taxpayer must carry incidentals of his occupation are nondeductable. However, the Court noted that "additional expenses may at times be incurred for transporting job-required tools and material to and from work." Under such circumstances an allocation of costs between personal and business expenses should be made.

This Court has never defined when and how additional expenses may be deducted, nor if Fausner-type job required tool deductions are applicable to commuting

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1 Fausner v. Commissioner 413 U.S. 838 (1973).

expenses. Until the instant Court of Appeals decision, the Internal Revenue Service as well as commentators interpreted Fausner as allowing deductions for additional commuting expenses incurred as a direct result of an employer's requirement that an employee transport certain tools or material to and from work[2].

The Court of Appeals Second Circuit has held in the instant matter [3] that such deductions are subject to the 'personal choice' doctrine which is articulated in Commissioner v. Flowers[4]. The majority opinion relying on Flowers, denied petitioner's deductions because petitioner chose to live in the suburbs. The Appeals Court reasoned that petitioner's added expenses were attributable to his decision to reside in Suffern, New York, not due to his employer's requirement that he be armed. Such logic is clearly refuted by the simple proposition

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2 See Internal Revenue Ruling 75-380
See 26 Baylor Law Rev. 262 (1974)

3 McCabe v. Commissioner - F2d-(1982) opinion attached heretofore in the Appendix.

that no matter where petitioner resided, he, would not have incurred any additional commuting expenses if the employer had not required that he carry his service revolver at all times within the City of New York.

The Second Circuit's logic inhibits any deduction for tools or material required by the employer to be transported between home and work since an employee can theoretically live next door to his employment and thus avoid any additional expenses necessitated by the transportation of tools or material. The Court of Appeals decision thus precludes any Fausner-type deductions and paves the way to applying the Flowers 'personal choice' doctrine to innumberable inopposite situations.

Concerned with the instant litigation are over one thousand (1000) New York City police officers who reside in northern

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4 Commissioner v. Flowers 326 U.S. 466 (1945). In Flowers the Court established a three part test to determine the deductability of travelling expenses. The personal choice doctrine was directed at a taxpayers decision to establish two residences and is not dispositive of the required 'tool exception' noted in Fausner.

New York suburban counties that are adjacent to New Jersey. These police officers as well as petitioner are prohibited from carrying their service revolvers through the State of New Jersey. Subsequently, these officers must incur additional commuting expenses to circumvent that state. Many of these police officers have been deducting the additional commuting expense since at least 1973, and in some cases have continued taking the Fausner-type deduction through the current tax year [5]. Millions of dollars of questionable deductions are involved just with taxpayers closely connected to the instant litigation [6].

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[5] The McCabe decision was decided on April 14, 1982, the last day on which to prepare tax returns before the April 15th deadline.

[6] Petitioner is represented by general counsel to the New York City Patrolmen's Benevolent Association. The instant litigation was instituted to determine the applicability of Fausner-type deductions to officers living in Northern suburban New York communities.

Moreover, the instant litigation affects thousands of other litigants. As Judge Meskill indicated in his dissent the decision eliminates all Fausner-type deductions because ultimately all additional commuter costs are a result of 'personal choice' of the location of one's residence. The decision is in conflict with Rev. Rul. 75-380 and would eliminate deductions for carpenters, plumbers and others who must utilize vans or trailers to transport employer required tools to and from work. The decision also affects musicans and painters who incur additional expenses to transport bulky instruments or material between home and work.

The 'personal choice' analysis utilized by the majority decision has implications for certain deductions taken by trucking companies, railroads and manufacturers. Trucks and other vehicles transporting flammable, hazardous or radioactive materials are often limited to certain routes and prohibited from entering population centers.

These companies choice of corporate locale affects the cost of complying with these prohibitions and restrictions in the exact manner that petitioner's choice of residence effects his added cost of commuting [7].

In Flowers the Court stated that expenses incurred for travel between residences a taxpayer maintained in two different cities were expenses occasioned solely by the taxpayers personal propensities. Flowers is not dispositive and factually distinguished from the instant matter.

Petitioner pursuant to his employer's directive, had to transport his weapon between home and work. In avoiding a New Jersey prohibition against carrying weapons through that state petitioner incurred additional expenses he would not normally have incurred.

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7 It is important to note that petitioner's place of employment is located in Manhattan. Housing costs preclude petitioner from residing in Manhattan. Average monthly rental costs for a 5 room apartment exceed petitioner's monthly salary.

Flowers is inapplicable because petitioner transported his gun in furtherance of his employer's business of enforcing the law within the City of New York. Petitioner gained no personal benefit from travelling to work armed; but rather furthered his employer's objective by being prepared to enforce the law at all times within the city, whether or not he was on duty.

If in fact Fausner-type deductions are allowable then petitioner is entitled to deduct the additional cost of commuting incurred as a result of the requirement that he transport his service revolver between home and work.

THE COURT OF APPEALS DECISION WAS CLEARLY ERRONEOUS AND IN CONFLICT WITH THE 'REQUIRED TOOLS' EXCEPTION TO THE COMMUTER RULE

The general rule concerning commuting expenses is that the cost of commuting or driving to work is a nondeductible personal expense. Such expenses are nondeductible because they lack a necessary and direct relation to the prosecution of business[1].

An exception to the above rule was created in Rice v. Riddell[2] where the district court permitted a musician to deduct the cost of transporting his instrument to and from work[3]. Rice v. Riddell formed the basis of Rev. Rul. 63-100[4] which established the "but for" test to determine the deductability of commuting expenses. Pursuant to Rev. Rul. 63-100 if a taxpayer would not have incurred certain expenses but for the necessity of taking his job-required tools with him to work then such expenses were deductible. In Tyne v. Commissioner[5] the 7th Circuit adopted an allocation rule and held that

"even if a taxpayer had driven to and from work had it not been necessary to transport his tools," he should be allowed to deduct the portion of his driving expenses which were allowable to the Transportation of Tools.

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1 Commissioner v. Flowers 326 U.S. 465, 473 (1946).

2 Rice v. Riddell 179 F. Supp. 576 (1959).

3 A tuba and violin.

4 Rev. Rul. 63-100 attached hereto in the Appendix, was superseded by Rev. Rul. 75-380.

5 Tyne v. Commissioner 385 F2d 40 (7th Cir. 1967).

In Fausner v. Commissioner,[6] the Court addressed a conflict between the 5th Circuit[7] which refused to allow an allocation of driving expenses merely because tools were carried, and the Second[8] and Seventh Circuits[9] which allowed a portion of expenses to be deducted as ordinary and necessary. In Fausner the Court held that commuting expenses could not be considered ordinary and necessary merely because a taxpayer must carry incidentals of his occupation with him. However, the Court further stated that an allocation of costs may be feasible when additional expenses are incurred for transporting job-required tools.

Following Fausner the Second Circuit in Coker v. Commissioner[10] held that Sulivan was overruled. In Coker the Court held that a taxpayer cannot deduct the cost of driving if he would have utilized his automobile even if not required to carry tools.

In 1975 the Commissioner issued Rev. Rul. 75-380 and revoked Rev. Rul.

63-100. In Rev. Rul. 75-380 the Commissioner eliminated the "but for" test and stated that where a taxpayer incurs additional costs above ordinary commuting expenses because of the necessity of transporting work implements to and from work, he is entitled to deduct such additional costs [11].

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[6] Fausner v. Commissioner 413 U.S. 838 (1973).

[7] Fausner.

[8] See Sulivan v. Commissioner 368 F2d 1007 (2nd Cir. 1966).

[9] Tyne v. Commissioner 385 F2d 40 (7th Cir. 1967).

[10] Coker v. Commissioner 487 F2d 593 (2nd Cir. 1973).

[11] Rev. Rul. 75-380 states in part "thus, where a taxpayer can prove that transportation costs were incurred in addition to the ordinary, nondeductible commuting expenses, and these additional costs are attributable solely to the necessity of transporting work implements to and from the work location, the tax-

footnote 11 continued

payer will be entitled to deduct such additional costs under Section 162 of the code, regardless of whether the primary purpose or "but for" test set forth in Rev. Rul. 63-100 is satisfied." (See Appendix attached heretofor for full text of opinion).

Petitioner in the instant matter incurred additional expenses he would not have ordinarily incurred except for the necessity of transporting his service revolver to and from work. The majority opinion in the Tax Court found as fact that petitioner incurred additional expenses he would not have ordinarily incurred except for the necessity of transporting his service revolver to and from work. The majority opinion in the Tax Court found as fact that petitioner incurred additional commuting expenses solely because of his employer's requirement that he be armed at all times within the City of New York. The Court stated:

> "We accordingly find as fact that petitioner would have commuted to work by using the bus and subway but for the necessity of carrying his service revolver." McCabe v. Commissioner 76 T.C. 876, 881 (1981).

Once the Tax Court found that petitioner incurred additional expenses he would not have incurred "but for" his employer's

requirement that he carry his service revolver; the Tax Court and Court of Appeals were precluded from finding that the expenses were personal and nondeductible.

The Court of Appeals assertion that the Tax Court decision was the result of a determination of fact is clearly erroneous and illogical. As indicated above the facts as found by the Tax Court clearly demonstrated that petitioner incurred added expenses because of his employer's requirement that he be armed. The determination to disallow this deduction as personal was purely a legal determination in which a question of law was unmistakably involved [12]. The Court of Appeals reliance on Chenango Textile Corp. v. Commissioner 148 F2d 296 (2nd Cir. 1945) and Commissioner v. Heininger 320 U.S. 467 (1943) to uphold the Tax Court decision is misplaced and erroneous. Once the Tax Court found that petitioner incurred additional expenses because of his employer's requirement that he be armed, it was clearly an erroneous decision to

deny petitioner's deduction. The Tax Court decision was contrary to the exception noted in Fausner and in direct conflict with the guidelines articulated in Rev. Rul. 75-380. The record definitely and undeniably indicates that the Tax Court misinterpreted the law governing the deductability of additional commuter expenses[12]. The inference derived from the stipulated facts as well as the Tax Court's finding, could only be interpreted as demonstrating that petitioner incurred additional commuting expenses solely because of the requirement that he be armed and enforce the law at all times within the City of New York. The Court of Appeals, thus applied the wrong standard of review in the instant case and committed error in affirming the Tax Court determination.

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[12] See Fausner, supra. Rev. Rul. 75-380.

CONCLUSION

The decision of the Court of Appeals Second Circuit in McCabe v. Commissioner rekindles the conflict and confusion that the Court sought to resolve in Fausner v. Commissioner. The McCabe decision radically alters the prior standards for determining the deductability of additional commuting expenses caused by an employer's requirement that tools be transported to and from work. Furthermore, the 'personal choice' analysis articulated in the McCabe decision would render meaningless all Fausner-type deductions. To insure uniform application of the law and eliminate confusion concerning the deductability of additional commuting expenses, this Court should grant the petition for certiorari and reverse the Judgment below.

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OCTOBER TERM 1982

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DENNIS MCCABE

Petitioner-Appellant

- against -

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A P P E N D I X

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 646 - August Term, 1981

(Argued January 25, 1982 Decided April 14, 1982)

Docket No. 81-4175

DENNIS McCABE

Petitioner-Appellant,

- against -

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

Before:

MESKILL and CARDAMONE, Circuit Judges, and HOLDEN, District Judge.*

Appeal from a decision of the United States Tax Court (en banc), Raum, J., which denied appellant a deduction taken under I.R.C. Section 162.

Affirmed. Meskill, C.J., dissents.

PAUL BRENNER, New York, New York (RICHARD HARTMAN Jeffrey S. Wasserman, Law Offices of Richard Hartman, New York, New York, on the brief), for Petitioner-Appellant.

STEVEN I. FRAHM, Attorney, Tax Division, Dept. of Justice, Washington, D.C. (Glenn L. Archer Jr.., Assistant Attorney General, Washington, D.C., Michael L. Paup, Chief, Appellate Section, Tax Division, Department of Justice, Washington, D.C., Jonathan S. Cohen, Attorney, Tax Division, Department of Justice, Washington, D.C., on the brief), for Respondent-Appellee.

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*Honorable James S. Holden, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

CARDAMONE, Circuit Judge:

The appellant, Dennis McCabe, a police officer employed by the City of New York, was required to carry his service revolver at all times while in the City. To reach his place of employment the most direct route from his home to Suffern, New York is through the State of New Jersey. New Jersey will allow an officer such as petitioner to carry a weapon only by permit. Stating that he could not expect to obtain a New Jersey permit, appellant carried his service revolver on his person and used his own automobile as his mode of transportation to and from work. As a result he claimed an employee business deduction in the amount of $2,950 for automobile expense on his 1976 tax return. The Commissioner of Internal Revenue, appellee, disallowed the claimed deduction and the Tax Court affirmed that determination. Appellant appeals from that decision. We affirm for the reasons which follow.

FACTS

The facts of this case were stipulated and may be briefly stated. At the time he filed his petition in 1976 appellant resided in Suffern, New York. Suffern, a relatively remote suburb of New York City, lies west of the Hudson River and immediately adjacent to the State of New Jersey. Appellant was employed as a New York City police officer assigned exclusively to Manhattan's Twenty-Eighth Precinct. The regulations of the New York City Police Department then in effect required police officers to be armed at all times when in the City, unless otherwise directed[1] The State of New Jersey, through which petitioner would travel were he to commute to work by the most direct route, permits officers employed by governmental agencies outside the State to carry weapons in New Jersey only while engaged in official duties and upon prior notification to local police authorities. See N.J. Stat. Ann. Section 2A: 151-43(a) (West 1969) (repealed 1979) (Current version of N.J. Sta. Ann. Section

New York City police officers carrying a service revolver through New Jersey either by public or private conveyance would be in violation of New Jersey law without a New Jersey gun permit. Generally, New Jersey authorities issue gun permits only to those persons whose job requirements necessitate that they be armed in New Jersey or to persons able to establish urgent need[2].

Throughout 1976 appellant used his personal automobile as his exclusive means of commuting to and from his duty station at the Twenty-Eighth Precinct. While commuting he carried his service revolver on his person and did not modify his automobile to accommodate the gun. Therefore, the cost of operating the vehicle by carrying a revolver was the same as it would have been had he commuted to his job by automobile without the revolver. But the record clearly established that appellant's commuting costs could have been reduced had he been able to travel through New Jersey.[3] The record further shows that ample public transportation existed from Suffern to New

York City.[4] Since much of the convenient public transportation went through New Jersey, appellant would have again been faced with the need for a New Jersey gun permit.

On his 1976 income tax return appellant claimed $2,950[5] in automibile expenses as a deduction on Form 2106, Employee Business Expenses. This deduction represented the commuting costs of driving 17,600 miles between Suffern and New York City, which included bridge and thruway tolls. The Commissioner of Internal Revenue disallowed the entire deduction and the Tax Court affirmed.

DISCUSSION

At issue before us is when the ordinary and necessary business deduction embodied in Internal Revenue Code (I.R.C.) section 162(a) (1976)[6] may properly be claimed. We first analyze this issue to determine whether it is one of fact or law. In Commissioner v. Heininger, 320 U.S. 467 (1943), the Supreme Court stated that "[w]hether an expenditure is directly

related to a business and whether it is ordinary and necessary are doubtless pure questions of fact in most instances. Expect where a question of law is unmistakably involved a decision of the Board of Tax Appeals [presently the United States Tax Court] on these issues...should not be reversed by the federal appellate courts." Id. at 475 (emphasis supplied) (footnote omitted). See, e.g., Sibla v. Commissioner, 299 F.2d 48 (7th Cir. 1962); Chenango Textile Corp. v. Commissioner, 148 F.2d 296 (2d Cir. 1945); Geo. J. Haenn v. Commissioner, 147 F. 2d 682 (3d Cir. 1945); see also, Dobson v. Commissioner, 320 U.S. 489 (1943).[7]

As we recognized in Chenango the determination of whether a question is one of law or one of fact is not always easy. This is particularly true where the lower court cites appellate court opinions to justify its conclusion, since it then becomes difficult to determine whether that court exercised its own independent judgment. In Chenango we resolved this dilemma by

placing particular emphasis on the Supreme Court's language in Heininger. "[S]ince there is not a 'quesion of law...unmistakably involved' we shall assume that the decision was the result of a determination of fact . . ." Chenango, 148 F.2d at 298.

Here we are asked to rule on the ordinary and necessary business deduction. This is a factual inquiry and one which has been answered by the Tax Court. However, as in Chenango, the lower court relied on appellate court opinions to justify its conclusion. Because it cannot be said that a question of law is not unmistakably involved, we employ the Chenango rule and assume that the Tax Court's decision was the result of a determination of fact. In the context of a question of fact it will be necessary to determine only whether the Tax Court's decision was clearly erroneous, i.e., not adequately supported by the evidence, which will be discussed at II, infra.

Internal Revenue Code section 162 is concerned with expenses incurred as a direct

result of engaging in business. For appellant to prevail he must establish that his expense falls within the general provisions of section 162(a)[8] - ordinary and necessary expenses of carrying on a trade or business. We agree with the determination of the Tax Court that petitioner failed to meet his burden in this regard.

For section 162 purposes "ordinary" means normal and expected; "necessary" means appropriate and helpful.. Commissioner v. Heininger, 320 U.S. at 471. Thus, the question becomes whether petitioner's additional expenses were appropriate, helpful, normal and expected under the circumstance or so personal in nature as to be nondeductible under I.R.C. Section 262 (1976).[9]

One well-established rule in tax law is that expenses incurred as a result of commuting from home to work are personal and not deductible under Section 162. Treasury Regulation Section 1.162-2(e) provides that "[c]ommuters' fares are not considered as business expenses and are not deductible."

Treas. Reg. Section 1.162-2(e) (1958). See also, Treas. Reg. Section 1.262-1(b)(5) (1972). The controlling precedent on this issue is Commissioner v. Flowers, 326 U.S. 465 (1946).

In Flowers the Court was faced with a case involving a taxpayer who lived in Jackson, Mississippi and worked in Mobile, Alabama. The taxpayer tried to deduct the travel expenses incurred in his excursions between the two cities and also claimed his expenditures for meals and hotel accomodations while in Mobile. The Supreme Court ruled that the additional expenses, including the commuting expenses, were not deductible. Although Flowers was concerned mostly with what is now I.R.C. Section 162(a)(2)[10], the Court's general analysis of Section 162 sheds illumination on the question before us. In setting forth the final prong of a three-part test of travel expense deductibility,[11] the Court stated that the "expense must be incurred in pursuit of business. This means that there must be a direct connection between the expendi-

ture and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade." 326 U.S. at 470. The Court concluded that the travelling expenses were "not incurred in pursuit of the business of the taxpayer's employer." Id. at 473. Further, the added costs were said to be "unnecessary and inappropriate" to the development of the employer's business. Id. The Court was of the view that the sole cause of the expense was the taxpayer's personal desire to reside in Jackson, "a factor irrelevant to the maintenance and prosecution of the [employer's] legal business." Id. Thus, personal convenience cannot be the motivating factor behind a Section 162(a) deduction. Where one chooses to live is generally a matter of personal convenience. See, e.g., Hitt v. Commissioner, 55 T.C.: 628 (1971); Gilberg v. Commissioner, 55 T.C. 611 (1971).

An exception to the commuting rule appears in Fausner v. Commissioner, 413 U.S.

838 (1973). Fausner acknowledged that commuting expenses are not deductible. "Congress has determined that all taxpayers shall bear the expense of commuting to and from work without receiving a deduction for that expense. We cannot read Section 262 of the Internal Revenue Code as excluding such [commuting] expense[s] from 'personal' expenses because by happenstance the taxpayer must carry incidentals of his occupation with him." 413 U.S. at 839 (footnote omitted). The brief per curiam states, however, that "[a]dditional expenses may at times be incurred for transporting job-requested tools and material to and from work. Then an allocation of costs between 'personal' and 'business' expenses may be feasible." Id. (footnotes omitted). While the Court provides little or no guidance as what kind of circumstances should trigger such an allocation, its specific reference to the commuter rule would indicate that the requirements of Section 162(a) - ordinary and necessary - must first be established before reaching

the reaching the additional step of allocating.

The Internal Revenue Service in Revenue Ruling 75-380, 1975-2 C.B. 59 sought to explain Fausner. It stated that for additional expenses to be deductible the taxpayer must first establish "the necessity of transporting work implements to and from work." 1975-2 C.B. at 60. Giving the word "necessity" its usual meaning in tax law, it again appears that the taxpayer must establish that the additional expenses were appropriate and helpful to the employer's legal business and not personal in nature.

II

With this background in mind we may resolve the case presently before us. Appellant has argued that he may deduct the additional travelling expense incurred by reason of the use of his automobile in transporting his police revolver. However, a majority of the Tax Court ruled, sitting en banc:

> that petitioner's additional commuting expenses were not directly connected with the pursuit of his employer's business, but were principally the result of his decision to reside in a comparatively remote suburb adjacent to New Jersey. Accordingly, petitioner is entitled to no deduction for his commuting expenses under section 162(a), I.R.C. 1954, since such expenses were not necessary for the conduct of his employer's business.

McCabe v. Commissioner, 76 T.C. 876, 881 (1981).

We turn now to the applicable scope of appellate review on an appeal from the Tax Court. This standard is set forth in 26 U.S.C. Section 7482(a) (1976) which states that "[t]he United States Court of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court... in the same manner and to the same extent as decisions in the district courts in civil actions tried without a jury..." Federal Rule of Civil Procedure 52(a) states that findings of fact shall not be set aside unless clearly erroneous. "A finding is 'clearly erroneous' when although there is evidence to support it, the review-

ing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). See, e.g., Commissioner v. Duberstein, 363 U.S. 278, 291 (1960). While Taylor v. Lombard, 606 F.2d 371, 372 (2d Cir. 1979), citing both Smith v. Regan, 583 F.2d 72, 76 (2d Cir. 1978) and United States ex rel Lasky v. LaValleem 472 F.2d 960, 963 (2d Cir. 1973), indicates the "clearly erroneous" standard applies only when live testimony and credibility factors are involved, the standard also extends to findings derived from inferences drawn from documents or undisputed facts. United States Gypsum Co., supra, 333 U.S. at 394. See also United States v. Florida, 482 F.2d 205, 208 n. 8.

We are persuaded that the critical finding of the Tax Court, as set out above, is adequately based on permissible inferences derived from the stipulated facts. Since the record does not generate a definite

and firm conviction that a mistake has been committed, we must affirm the Tax Court. The New York City requirement that police officers be armed within city limits presented a problem for appellant simply because of the location of his home. Had he lived almost any place else in the New York City metropolitan area of New York State he would not have had to travel through the neighboring state of New Jersey. The Police Department required that officers be armed within New York City limits; it did not require them to be armed otherwise. Thus, the added expense incurred by appellant did not further the New York City Police Deparment's business of preventing crime within the City itself.

Finally, appellant's argument that he falls with the ambit of Fausner is fatally defective. Although concededly he incurred additional expense, in order to deduct it he must first show that it was ordinary and necessary. As noted, the location of one's home is personal and did not serve to further

the business of the taxpayer's employer in this case.

The judgment is affirmed.

FOOTNOTES

[1] Patrol Guide Section 105-1, which so provided, has since been amended so that police officers are no longer required to carry a firearm while "off duty."

[2] It is not clear from the stipulated facts whether the Commissioner concedes that had appellant actually applied for a New Jersey gun permit, such application would have been turned down. Appellant claims that this was the intent of the language included in the stipulation. Since the government may have misleadappellant into believing that he need not apply for the New Jersey gun permit, we find it desireable to reslove whatever ambiguity may exist in apppellant's favor so as to allow for a determination of this case. We do not mean to suggest that the general rule requiring exhaustion of administrative remedies is to be lessened.

[3] A daily round trip was approximately eighty miles via New York highways with toll costs of two dollars per day and took approximately seventy-five minutes

one way. Were appellant to have driven through New Jersey his toll costs would have been one dollar and fifty cents per day, the distance traveled would have been approximately fifty miles and travel time approximately forty-five minutes one way.

[4] The Shortline Bus Company provides weekday departures from Suffern to New York City at least as frequently as every fifteen minutes between 6:00 a.m. and 8:09 a.m. in the morning. In the evening between 4:00 p.m. and 6:10 p.m. weekday departures left New York City for Suffern at least as frequently as every twenty minutes. Appellant's tour of duty during 1976 consisted of working weekdays from 8:00 a.m. to 4:00 p.m.

[5] Appellant no longer seeks a deduction in the amount of $2,950. Instead the dispute concerns only a portion of that sum - the difference between the cost of driving through New York and the cost of public transportation passing through New Jersey -

which has not been given a dollar amount in the record before us.

[6] Section 162(a) provides that :

> In General - There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business...

I.R.C. Section 162(a) (1976).

[7] For discussions on the scope of appellant review of a Tax Court decision, see generally, Commissioner v. Idaho Power Co., 418 U.S. 1 (1974) (Douglas, J., dissenting); Commissioner v. Duberstein, 363 U.S. 278 (1960); Burton-Sutton Oil Co. v. Commissioner, 328 U.S. 25 (1946) (Frankfurter, J., Concurring); Commissioner v. Wilcox, 327 U.S. 404 (1946); John Kelley Co. v. Commissioner, 326 U.S. 521 (1946); Trust of Bingham v. Commissioner, 325 U.S. 365 (1945) (Frankfurter, J., concurring).

[8] Section 162(a), see note 6, supra, provides the general rule on the deductability of business expenses. The list of specific

deductions found in paragraph (a)(1) through (a)(3) is exemplary only. For instance (a)(1) deals with salaries and compensation, while (a)(3) concerns rent and other payments required for possession of business property. Paragraph (a)(2) deals with travel expenses incurred "while away from home," a phrase which has been "held to apply only to overnight trips or to travel requiring sleep or rest." Gilberg v. Commissioner, 55 T.C. 611, 614 (1971). See, United States v. Correll, 389 U.S. 299 (1967). Nowhere in the record has appellant contended that he incurred expenses "while away from home." Thus for appellant to prevail he must establish that he is covered by the general provisions of section 162 (a).

9 "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." I.R.C. Section 262 (1976).

10 See note 8, supra.

11
The first two prongs which must be satisfied before a travelling expense deduction may be taken under section 162(a)(2) are:

(1) The expense must be a reasonable and necessary travelling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while travelling.

(2) The expense must be incurred "while away from home." Commissioner v. Flowers, 326 U.S. 465, 470 (1946).

#81-4175
McCabe v. C.I.R.

MESKILL, Circuit Judge (dissenting):

I respectfully dissent.

I cannot agree with the majority's conclusion that McCabe's additional commuting costs were entirely a result of his personal choice of residence. In Fausner v. Commissioner, 413 U.S. 838 (1973) (per curiam), the Supreme Court disallowed a deduction for commuting costs where the taxpayer, a commercial airlines pilot, claimed that his "automobile expenses were incurred to transport his flight bag and overnight bag and thus constituted ordinary and necessary business expenses." Id. at 838. Because the taxpayer would have driven to work via the same route in any event, the Court found that no "allocation of costs between 'personal' and 'business' expenses" was feasible. Id. at 839. The Internal Revenue Service has construed Fausner:

> to allow an ordinary and necessary business expense deduction for only the portion of the cost of transporting the work implements by the mode of transportation used which is in excess of cost of commuting by the same mode of transportation without the work implements. The fact that a taxpayer might have or would have used a less expensive mode of transportation if it had not been necessary to carrying the work implements is immaterial.

Rev. Rul. 75-380, 1975-2 C.B. 59, 50.

This case is factually distinguishable from Fausner. Had McCabe driven to work without his firearm, he could have travelled through New Jersey. As a result of his alleged inability to secure a New Jersey gun permit, however, McCabe was forced to take a circuitous route, adding fifty cents in tolls and fifteen miles to his commute. Compare Stipulated Facts, Paragraphs 13-14 with Stipulated Facts, Paragraphs 30-31. Certainly, these additional costs were caused by his employer's requirement that he carry his firearm at all times while within New York City and can be allocated as "business" expenses under Fausner.

The majority's reasoning, that "the location of one's home is personal and in

this case does not serve...to further the business of the taxpayer's employer[,]" Maj. Op. at 8, drawn to its logical extreme, would disallow or render meaningless almost all Fausner-type deductions. A taxpayer can almost always reduce or eliminate his excess commuting costs by living closer to his work location. The real issue is whether, given the location of McCabe's residence and his selection of a reasonable mode of travel, he incurred additional "ordinary and necessary" commuting cost "in the pursuit of the business of the taxpayer's employer." Commissioner v. Flowers, 326 U.S. 465, 473 (1946). To the extent that McCabe's change in route of travel was necessary to satisfy his employer's requirement that he carry his firearm while in New York City, I believe that he is entitled to a deduction under section 162(a) of the Internal Revenue Code.

The record does not indicate, however, whether McCabe ever applied for a New Jersey gun permit or demonstrated the futility of such an application. McCabe's inability

to obtain a permit is critical to his argument that his additional commuting costs are deductible as "ordinary and necessary" business expenses pursuant to Section 162(a). The sole factual Stipulation concerning his attempt to obtain a permit states:

> Generally, New Jersey authorities issue gun permits only to those individuals with job requirements necessitating that they be armed in that state or to individuals who can establish other urgent need. Applications for gun permits are evaluated on their own merits..

Stipulated Facts, Paragraph 9. I would therefore remand this case to the Tax Court for a determination of what efforts, if any, McCabe made to acquire a permit. If the Tax Court determined that McCabe never applied for a permit or that he failed to demonstrate the futility of an application, the Court should disallow his deduction for failure to meet the threshold showing that the added commuting expenses incurred were necessary. If the Court were satisfied, however, that McCabe could not obtain a permit, it should allow his deduction

under Section 162(a).

76 T.C. No. 76

UNITED STATES TAX COURT

DENNIS McCABE, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 1536-78 Filed June 3, 1981.

T, a New York City police officer, is required to carry his revolver at all times while in New York City. T lives in a relatively remote suburb of New York west of the Hudson River and immediately adjacent to New Jersey. The most convenient and direct routes to T's post of duty in New York City require travel through New Jersey, the statutes of which prohibit T from carrying his revolver while in that state. Accordingly, T drives to work by the way of the more circuitous New York highways, although he would otherwise use the more convenient public transportation through New Jersey and incur less commuting expenses but for the necessity of carrying his revolver. T seeks to deduct the difference between the cost of driving through New York and the cost of public

transportation passing through New Jersey.

Held, Petitioner is entitled to no deduction for his commuting expenses because they were not directly connected with his employer's business, but were personal expenses incurred as a result of petitioner's choice of the location of his residence.

Paul S. Brenner, for the petitioner.

Robert J. Alter, for the respondent.

OPINION

RAUM, Judge: The Commissioner determined a $908 deficiency in petitioner's 1976 income tax. The only remaining issue is whether petitioner is entitled to deduct some portion of his automobile expenses in transporting himself and his service revolver to and from his place of employment as a police officer. The case was submitted on the basis of a stipulation of facts.

During 1976, and at the time he filed his petition herein, petitioner resided in Suffern, New York. Suffern is a relatively remote suburb west of the Hudson River and is immediately adjacent to the State of New Jersey. In 1976, he was employed as a New York City police officer assigned exclusively to the 28th Precinct at 2271 Eighth Avenue, New York, New York. Petitioner's tour of duty during 1976 consisted of working 243 weekdays from 8:00 a.m. until 4:00 p.m. only.

The regulations of the New York Police Department require police officers

to be armed at all times when in the City of New York unless otherwise directed. However, New Jersey, through which petitioner would travel if he commuted to work by driving over the most direct route or taking a bus, permits officers employed by governmental agencies outside the State of New Jersey to carry weapons in New Jersey only while engaged in official duties and upon prior notification to local police authorities. See N.J. Stat. Ann. sec. 2a:151-43(s) (West 1969) (repealed 1979) (current version at N.J. Stat. Ann. sec. 2C:39-6(b)(1) (West 1980)). New York City police officers carrying a service revolver through New Jersey by either public or private conveyance would be in violation of the New Jersey law if they did not have a New Jersey gun permit. Generally, New Jersey authorities issue gun permits only to those person with job requirements necessitating that they be armed in that state or to person who can establish other urgent need. Applications

for gun permits are evaluated on their own merits.

During 1976, petitioner used his personal automobile as his exclusive means of commuting to and from his post of duty at the 28th Precinct. Petitioner did not use his own automobile during his work day. When petitioner commuted to his job by automobile, he carried his service revolver on his person and did not modify his automobile in any way in order to carry the revolver. Petitioner incurred no added expense in the cost of operating his vehicle by carrying his revolver above that which he would have incurred if he had commuted to his job by automobile without the revolver. In travelling by automobile to and from the 28th Precinct from his home, petitioner traveled approximately 40 miles each way via New York highways. His route generally took 75 minutes to drive; toll costs were $2 per day. If petitioner had driven through New Jersey in commuting

to work, his toll costs would have been $1.50 per day, the distance would have been approximately 25 miles one-way, and travel time would have been approximately 45 minutes.

During 1976, a bus service provided by the Shortline bus company traveled from Suffern, New York, to the Port Authority Bus Depot in New York City. However, this bus traveled through New Jersey. If petitioner had taken the bus to New York City, he would have boarded the bus at a stop located two blocks from his home in Suffern. Between 6:00 a.m. and 8:00 a.m., weekday departures from Suffern for New York City occurred at least as frequently as every 15 minutes; in the evening, between 4:00 and 6:00 p.m., weekday departures from New York City for Suffern occurred at least as frequently as every 20 minutes. Travel time by bus from petitioner's home to the Port Authority Bus Terminal was approximately one hour. The one-way fare between Suffern and the bus terminal in Manhattan was $2.70;

however, a 50-trip bus ticket cost $76.60 from January 1 through October 27, 1976, and $82.75 for the remainder of 1976. From the Port Authority Bus Depot, petitioner would have to have taken an approximately 15 minute subway ride to the 28th Precinct. During 1976, petitioner could have ridden the subway without charge due to his police officer status.

Petitioner could also have used public transportation that did not pass through New Jersey. Petitioner could have driven 16 miles to Tarrytown, New York, on the east side of the Hudson River, and taken the Hudson line of Conrail to Grand Central Station in New York City. The drive to Tarrytown would have required approximately 30 minutes; round trip tolls between Suffern and Tarrytown would have been $1.50 per day, and parking at the Tarrytown train station would have cost $90 per year. The time from Tarrytown to Grand Central Station ranged from 38 to 54 minutes, depending upon which train was utilized. A monthly commuting ticket

cost $58.75. The route that petitioner actually took in driving his automobile from Suffern to this post of duty in New York City passed through Tarrytown.

On his 1976 income tax return, petitioner claimed $2,950 in automobile expenses as a deduction on form 2106, Employees Business Expenses. This deduction represented the commuting costs for 17,600[1] miles plus bridge and thruway tolls by virtue of petitioner's use of an automobile rather than a bus or train to travel between his home in Suffern, New York, and his job in New York City. The Commissioner disallowed the entire deduction.

It is well settled that a taxpayer's cost of commuting between his residence and his place of employment is a non-deductible personal expense. Sections 1.162-2(e) and 1.262-1(b)(5), Income Tax Regs.; see, e.g., Fausner v. Commissioner, 413 U.S. 838, 839 (1973); Commissioner v. Flowers, 326 U.S. 465, 473 (1946); Donnelly v. Commissioner, 262 F. 2d 411, 412, (2d Cir.

1959); Feistman v. Commissioner, 63 T.C. 129, 134 (1974), appeal dismissed 587 F. 2d 941 (9th Cir. 1978); Anderson v. Commissioner, 60 T.C. 834, 835 (1973). However, an exception to this rule has been recognized with respect to employees who are required by their employer to transport job related tools to and from work and thereby incur expenses in addition to the ordinary commuting costs they otherwise would incur.

1.

In computing the deduction for automobile expenses, petitioner determined the annual mileage driven by multiplying the 80 mile daily trip distance by 220 days. According to the stipulation, petitioner in fact worked 243 days in 1976, but he has presented no claim for an increased deduction. See Fausner v. Commissioner, supra, 413 U.S. at 839; Kallander v. United States, 526 F. 2d 1131, 1136 (Ct. Cl. 1975); Coker v. Commissioner, 487 F. 2d 593, 594 (2d Cir. 1973), cert. denied 414 U.S. 1130 (1974);

Feistman v. Commissioner, supra, 63 T.C. at 135; Gilberg v. Commissioner, 55 T.C. 611, 618-619 (1971); Hitt v. Commissioner, 55 T.C. 628, 632-633 (1971). If such additional expenses are incurred, they are deductible as "ordinary and necessary" business expenses pursuant to Section 162(a) I.R.C. 1954.

Petitioner claims that but for the necessity of carrying his gun, he would have taken the bus and subway to work, and thereby avoided the greater expense incurred in driving to work. Although petitioner's return claimed a deduction for his entire expenses[2] incurred in driving to work, he now claims, in his petition and on brief, a deduction for only the excess of this automobile expenses over the costs that he would have incurred in commuting by bus and subway.

The Government contends first that any additional commuting expenses petitioner incurred as a result of petitioner's personal

choice of the location of his residence, and did not arise out of his employer's requirement that he carry his gun while within New York City. The Government further disputes petitioner's assertion that he would have taken public transportation to work but for the necessity of carrying his gun; it argues that if petitioner desired to take public transportation to work, he would have driven to Tarrytown (which was on his actual route to New York City) and taken Conrail to Grand Central Station. Finally, relying on Rev. Rul. 75-380, 1975-2 C.B. 59, 60, the Government contends that the basic cost of commuting, whether by automobile or public transportation, is a nondeductible personal expense, and that petitioner is therefore entitled to no deduction because he incurred no tool-carrying expenses beyond

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2. But note 1, supra.

the basic cost of commuting to work.

It is stipulated that if petitioner had been called to testify in this case, he would have stated that he would have taken the bus and subway to work were it not for his having to commute carrying his service revolver. Because this case was submitted under Rule 122, we had no opportunity to observe petitioner's credibility as a witness. Petitioner's assertion that he would have preferred to commute by bus and subway is supported by the facts that the bus stopped only two blocks from his residence and that the commuting time by bus and subway was not substantially greater than the commuting time driving over New York highways. We accordingly find as a fact that petitioner would have commuted to work by using the bus and subway but for the necessity of carrying his service revolver. To be sure, the Government disputes petitioner's commitment to public transportation by noting that petitioner could have taken public transportation by driving to Tarrytown and boarding a Conrail train.

However, this method of commuting would have required the use of petitioner's automobile and would have taken more time than driving wholly through New York State or commuting by bus and subway. In the circumstances, we find credible petitioner's assertion that he would have taken the bus and subway to work if he had not been required to carry his service revolver.

Despite our conclusion that petitioner would have utilized public transportation to commute to work but for the necessity of carrying his service revolver, we find that petitioner's additional commuting expenses were not directly connected with the pursuit of his employer's business, but were principally the result of his decision to reside in a comparatively remote suburb adjacent to New Jersey. Accordingly, petitioner is entitled to no deduction for his commuting expenses under section 162(a), I.R.C. 1954, since such expenses were not necessary for the conduct of his employer's business.

In order to qualify for a deduction of transportation expenses under the general provisions of Section 162(a), petitioner must demonstrate that such expenses were directly connected with the pursuit of his employer's business and were not commuting expenses incurred solely for personal reasons. See Commissioner v. Flowers, supra, 326 U.S. at 470, 472-474; Gilberg v. Commissioner, supra, 55 T.C. at 614; Bunevith v. Commissioner, 52 T.C. 837, 841 (1969), affd. 70-1 USTC par. 9414, 25 AFTR 2d 70-935 (1st Cir. 1970). cf. Carragan v. Commissioner, 197 F. 2d 246, 249 (2d Cir. 1952). Petitioner has not met this burden. It is true that Petitioner would have incurred no additional expenses but for his employer's requirement that he carry his service revolver while within the City of New York. However, this requirement presented difficulties for petitioner only because he had chosen to live near New Jersey so that the most direct routes to his place of employment, either by automobile or public transportation, re-

quired travel through that state. The New York City Police Department required only that petitioner be armed when inside the City. The petitioner's added costs in meeting this requirement were due to his choice of a personal residence in Suffern and New Jersey law which prevented him from carrying his revolver through that state. These costs were wholly unnecessary and inappropriate for the conduct of the New York Police Department's law enforcement duties within the City of New York. Accordingly, petitioner's added expenses in avoiding travel through New Jersey, as well as his basic commuting costs, are personal in nature, and no deduction for such expenses can be allowed. Section 262, I.R.C. 1954.

We have reached our decision in this case solely on the basis of the Government's argument that petitioner's commuting expenses were wholly personal in nature. We accordingly express no opinion as to whether an employee's additional commuting costs for

utilizing a more expensive mode of transportation than he would otherwise have used in order to carry job-required tools may be considered deductible in appropriate circumstances. See generally Rev. Rul. 75-380, supra, 1975-2 C.B. at 60.

We emphasize that we do not pass upon the application of the concept suggested in Fausner v. Commissioner, supra, 413 U.S. at 838 -- i.e., that an allocation of costs might be appropriate where additional expenses are incurred for transporting job-required tools and material to and from work. That concept is inapplicable here because petitioner has failed to satisfy the threshold condition that any deductible expenses must be incurred in pursuit of business and not as the result of personal requirements. This threshold condition was plainly indicated in Commissioner v. Flowers, supra, 326 U.S. at 473:

> The added costs in issue, moreover, were as unnecessary and inappropriate to the development of the railroad's business as were his personal and living costs in Jackson. They were incurred solely as the result of

> the taxpayer's desire to maintain a home in Jackson while working in Mobile* * *. It simply asked him to be at his principal post in Mobile as business demanded* * *.

Similarly here, the City of New York did not require petitioner to travel from Suffern to his post of duty and to have his service revolver with him at all times in New York. It did not require him to carry that revolver through New Jersey. It was petitioner's personal choice to reside in a place where the most convenient route to his post of duty was through New Jersey. This case is quite unlike those cases where a taxpayer is required to incur additional expenses for transporting job-related tools to work regardless of where he lives. The possible allowance of deduction of the extra cost of such transportation is not a matter that is in issue or decided herein.

Due to the Government's concession of another issue,

Decision will be entered under Rule 155.

Reviewed by the Court.

SCOTT, J., concurring: I agree with the majority that petitioner is not entitled to any deduction for travel between his home and place of employment since it was for personal reasons that he chose his place of residence. However, I do not agree with any implication that might be present in the majority opinion that under certain circumstances petitioner would be entitled to a deduction because of the requirement that he have his service revolver with him at all times when he was in New York City.

Accepting the fact as found by the majority that because of New Jersey law petitioner could not carry his pistol through that state,[1] I do not consider that this

[1] Although I am willing to accept the conclusion of the trial judge even in a fully stipulated case such as this, I have great difficulty in understanding why petitioner was prohibited by New Jersey law from carrying a revolver through New Jersey. The parties stipulated that "New Jersey permits officers employed by governmental agencies outside the State of New Jersey to carry weapons in New Jersey only while engaged in official duties and upon prior notification

to local police authorities" and "generally, New Jersey authorities issue gun permits only to those individuals with job requirements necessitating that they be armed in that state or to individuals who can establish other urgent need. Applications for gun permits are evaluated on their own merits." This stipulation is obviously the stipulation of a legal conclusion. The parties did not stipulate whether in fact petitioner had applied for a permit and whether the state authorities had denied the application.

Sec. 2A: 151-43 of the New Jersey Statutes Annotated as applicable to the year here involved contains numerous exceptions to the prohibition against the possession and carrying of a pistol without a permit. The section of this statute to which the parties obviously had reference in their stipulation is subsection(s) which provides:

case falls within the "tool" reference made in Fausner v. Commissioner, 413 U.S. 838 (1973). The Fausner case (at 839) states, insofar as here pertinent, as follows:

> As the Court of Appeals indicated, Congress has determined that all taxpayers shall bear the expense of commuting to and from work without receiving a deduction for that expense. We cannot read Section 262 of the Internal Revenue Code as excluding such expense from "personal" expenses because by happenstance the taxpayer must carry incidentals of his occupation with him. Additional expenses may at times be incurred for transporting job-required tools and material to and from work. Then an allocation of costs between "personal" and "business" expenses may be feasible. But no such allocation can be made here. [Fn. ref. omitted.]

In my view the reference to "additional expenses" being incurred for transporting "job-required tools and material"

Footnote 1--continued

Law enforcement officers employed by governmental agencies outside of the State of New Jersey who are engaged in their official duties provided that they have first notified the chief law enforcement officer of the municipality or the county prosecutor of the county in which they are engaged or the superintendent.

However, subsection (d) of this same statute provides an exception to the prohibition against carrying weapons without a permit as follows:

The regularly employed members, including detectives, of the police department of any county or municipality or of any State, interstate, municipal or county park police force or of any county boulevard police force at all times, while within the State of New Jersey * * *.

I would conclude from this statute, and have found nothing in the New Jersey law to persuade me to the contrary, that without any necessity of obtaining a permit from New Jersey a regularly employed police officer of New York City, such as petitioner, would be exempt from the prohibition against carrying a pistol within the State of New Jersey.

in the Fausner case was to the cost of transporting the tools where an additional cost such as excess baggage or trailer rental was incurred. It does not relate to requiring a determination of the mode

of transportation a taxpayer contends he may have used but rather to the mode of transportation that he actually did use..

FAY, J., dissenting: I respectfully dissent from the majority's conclusion that petitioner's expenses were "wholly personal." I agree with Judge Sterrett that contained within petitioner's expenses of travelling to and from work is a portion in excess of what petitioner would have otherwise necessarily incurred in commuting, and that excess is directly related to a requirement imposed by petitioner's employer.[1] See Fausner v. Commissioner, 413 U.S. 838, 839 (1973).

The majority opinion expressly declines to "pass upon the applicability of the concept suggested in Fausner***." Majority supra at 11. In my view, the Fausner question should have been addressed fully, and, furthermore, should have been resolved in petitioner's favor.[2] We have never, before today, ended our inquiry in this type of case with the conclusion that a taxpayer requirement-based excess travel costs. See, for example, the analysis in Hitt v. Commissioner, 55 T.C. 628 (1971)

and in Gilberg v. Commissioner, 55 T.C. 611 (1971).

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1 I base my dissent upon the facts as found by the majority including their finding that petitioner could not have obtained a permit to carry a gun through New Jersey.

2 In fact, the parties briefed this case almost exclusively on the Fausner issue.

It is obvious to me that petitioner incurred excess travel costs and that the excess was caused by his employer's requirement. True, the amount of that excess will be a function of petitioner's choice of residence, but that is always the case when such excess travel costs present themselves. For example, if a construction worker living 30 miles from his jobsite were required to tow a trailer of tools, would not his excess be less if he moved 20 miles closer to his jobsite, or completely eliminated if he moved into a house adjacent to the jobsite? The majority opinion, supra at 12, seeks to distinguish the long

line of "tool" cases as applying only to "additional expenses for transporting job-related tools to work regardless of where [the taxpayer] lives." However, as my example above illustrates, the "additional expense" could be eliminated or greatly reduced in almost every "tool" case. Thus, I remain unpersuaded that this case is different.[3] Petitioner's "additional expenses," those over and above his reasonable commuting expenses, were caused by his employer's requirement that petitioner have his gun with him when he entered New York City[4]. Where he lived does not alter that requirement; it merely affects the amount of the excess which could range from zero, see Coker v.

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[3] I am also unconvinced by Judge Scott's concurrence. In this case it is not the mode of travel but rather the route of travel which is mandated by the employer's requirement. If a true excess cost exists, it is irrelevant whether that excess exists due to mandated routes of travel or mandated means of travel. However, I do not necessarily agree with Judge Sterrett that we look to the taxpayer's "preferred means of transportation in order to calculate any excess.

Commissioner, 487 F.2d 593(2d Cir. 1973), cert. denied 414 U.S. 1130 (1974), on up.

I express no opinion as to the amount of petitioner's deductible travelling expenses. Although I would certainly reach the issue were I writing for the majority, I see no reason to enter into a laborious analysis of calculating

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4 In my view, petitioner's excess travel costs were caused by his employer's requirement even though the New Jersey law also affected petitioner's route of travel. If it were not for the employer's requirement, the New Jersey law on carrying guns would be irrelevant to petitioner.

Consider the case of a construction worker who must travel one of two equal distance roads to his jobsite. He chooses Road 1 because using Road 2 would necessitate paying $1/day toll charge. Suppose my worker's employer imposes a requirement requiring that worker to carry his tools to and from work, which, in turn, necessitates that worker's towing a trailer to and from work. Pursuant to that requirement and state law prohibiting trailers on Road 1, petitioner must travel Road 2 and incur the $1/day toll charge. Would not that $1.00 be deductible? I conclude that it would. When a combination of an employer requirement and an outside force causes an employee to incur expenses greater than his ordinary, reasonable commuting expenses, the excess should be deductible by the employee if the outside force's applicability to the employee is caused by the employer's requirement.

footnote 4 continued

In fact, in almost every tool case it will be a combination of factors which lead to the employee's incurring additional expenses. For example, if an employer requires a worker to have tools at the jobsite but the employer provides no tool storage place, it is both the employer's requirement and the worker's desire to have his tools left unexposed to weather and thieves that make the worker transport his tools to and from the jobsite.

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the excess amount at this time. It is clear from the record that no matter what bases of comparison are used, such as driving through New York versus driving through New Jersey or using public transportation through New York versus driving through New Jersey, petitioner did incur additional costs.[5] Accordingly, I would hold that petitioner is entitled to some part of his claimed travel expenses deduction.

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[5] However, I note that respondent, on brief, argued that if we held petitioner incurred deductible travel expenses, the deductible amount should be limited to the difference in cost between taking public transportation through New Jersey and taking public transportation, as much as possible, through New York. See also Rev. Rul. 75-380, 1975-2 C.B. 59, at 60.

STERRETT, J., dissenting: I respectfully dissent from the ultimate conclusion reached by the majority.

In so doing I proceed from the same basic premise as did the majority: namely, "a taxpayer's cost of commuting between his residence and his place of employment is a nondeductible personal expense." While the Supreme Court in Fausner v. Commissioner, 413 U.S. 838, 839 (1973), emphasized that hornbook rule of tax law, it added the following postscript:

> Additional expenses may at times be incurred for transporting job-required tools and material to and from work. Then an allocation of costs between "personal" and "business" expenses may be feasible. But no such allocation can be made here.

The facts in the instant case are a perfect illustration of when such an allocation can, and should, be made.

The circumstances are ideal because a revolver is to a policeman what a hammer is to a carpenter. A carpenter is required by his employer to bring his toolbox to work at his own expense. A policeman is

required by the New York City Police Department to have his revolver on his person at all times while in the City. In each case the requirement is imposed by the employer as a condition of employment. There is no personal element to the requirement; it is purely job-related.

Once the business necessity of an employee taking something with him to work is established, then any "additional expense" (over his preferred means of transportation) incurred solely by reason of that necessity should, under the Supreme Court's holding in Fausner, be deductible.

It is, of course, the taxpayer's burden to show the increment in the cost of commuting to work attributable to the job-related requirement. The precise nature of the added expenditure is of no moment as long as the expenditure can be characterized as "ordinary and necessary." Thus, it matters not whether the incremental cost is attributable to buying a trailer for the car to carry the tools or is attributable to taking a different route to work because

of circumstances beyond the taxpayer's control. Here, the taxpayer was prevented from taking the most direct and least expensive means of commuting to work by reason of New Jersey law.[1] I can envision a similar circumstance where a truck, carrying inflammable material, is limited by state law to the use of certain specific roads, thereby incurring additional expense. I would hold, therefore, that the petitioner incurred additional expense

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[1] We assume that the taxpayer could not get a permit to carry his revolver while in New Jersey.

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in getting to work due to a condition of his employment rather than his choice of where to live.

No doubt the question of determining the exact amount of the incremental job-related cost could be troublesome in many cases. See Coker v. Commissioner, 487 F.2d 593 (2d Cir. 1973). Here that presents no problem since the majority has found as a fact "that petitioner would have commuted to work by using the bus and subway but

for the necessity of carrying his service revolver." It appears that in this case the cost of using the bus and subway to and from work would have approximated $3.20 per day. I would allow petitioner to deduct any expense in excess of that amount incurred in commuting to work. Section 162, I.R.C. 1954.

WILES and WILBUR, JJ., agree with this dissenting opinion.

The Internal Revenue Service has reconsidered Rev. Rul. 56-25, 1956-1 C.B. 152, and Rev. Rul. 63-100, 1963-1 C.B. 34, in view of the decision by the Supreme Court of the United States in Fausner v. Commissioner, 413 U.S. 838 (1973), 1974-2 C.B. 42, affirming per curiam the decision of the Court of Appeals for the Fifth Circuit, 472 F. 2d 561 (1973), which in turn affirmed per curiam the decision of the United States Tax Court, 30 CCH Tax Ct. Mem. 1187 (1971).

Rev Rul. 56-25 holds that expenses incurred by an employee in using his automobile for commuting between his place of abode and his principal or regular place of work represents nondeductible commuting expenses within the scope of section 262 of the Internal Revenue Code of 1954, notwithstanding the fact that the automobile is also used to transport tools used by the employee in his work. In so holding, Rev. Rul. 56-25 states that the expenses incurred in going to and from work were not

increased by reason of the fact that the tools used by the employee in his work were also transported in the automobile.

Rev. Rul.56-25 was modified by Rev. Rul. 63-100 to remove the implication that such transportation expenses would not be deductible even if the employee would not have used his automobile on such trips "but for" the necessity of taking his tools with him. Rev. Rul. 63-100 holds that where it is necessary for a musician to use his automobile to transport his musical instruments between his residence and his place of work because they are too bulky to be carried otherwise, and he would not use his automobile on such trips "except for" that reason, the entire amount of his transportation expenses are deductible under Section 162 of the Code. The Revenue Ruling states that such expenses are deductible ordinary and necessary business expenses because they are occasioned primarily by the necessity for transporting bulky musical instruments, and that whether transportation

expenses are incurred primarily for business or personal reasons is a question of fact to be determined in each case.

In Fausner the taxpayer, an airline pilot, who regularly traveled by private automobile from home to his place of employment and back again, sought to deduct the entire cost of his commuting expenses under Section 162(a) of the Code on the theory that his automobile expenses were incurred to transport his flight bag and overnight bag and thus constitute ordinary and necessary business expenses. It was not disputed that the taxpayer would have commuted by private automobile regardless of whether he had to transport his two bags. The Supreme Court of the United States, referring to Section 262, held that the taxpayer was not entitled to any deduction with respect to the cost of transporting his flight and overnight bags in his automobile while commuting to and from his work. In addition the Court, citing Rev. Rul. 63-100, stated that additional expenses may at times be incurred for transporting job-required

tools and material to and from work and then an allocation of costs between "personal" and "business" expenses may be feasible.

In view of Fausner questions have arisen as to (1) whether the "primary purpose" or "but for" test of Rev. Rul. 63-100 is still valid, and (2) what is the amount of a taxpayer's deduction, if any, for transporting costs incurred in carrying job-required tools and material between the taxpayer's residence and place of work where the taxpayer (a) would have used the same mode of commuting irrespective of carrying such implements or (b) would not have used the same mode of commuting irrespective of commuting "but for" carrying such implements.

With respect to question (1), the Tax Court, the Fifth Circuit, and the Supreme Court in the Fausner case have all used an "additional expense" approach in determining whether the costs incurred by a taxpayer in transporting work implements to and from work are deductible. Thus, where

a taxpayer can prove that transportation costs were incurred in addition to the ordinary, nondeductible commuting expenses, and these additional costs are attributable solely to the necessity of transporting work implements to and from the work location, the taxpayer will be entitled to deduct such additional costs under Section 162 of the Code, regardless of whether the "primary purpose" or "but for" test set forth in Rev. Rul. 63-100 is satisfied.

In determining the deductibility of expenses in Rev. Rul. 63-100, and Rev. Rul. 56-25, as modified by Rev. Rul. 63-100, the sole focus is placed on the fact that the taxpayer would not have used the automobile for commuting purposes "but for" the need to take the tools. Those Revenue Rulings do not focus on whether the taxpayer incurred additional expenses for tool-carrying. The "additional expense" approach to deductibility of tool-carrying expenses referred to by the Supreme Court in Fausner focuses solely upon whether a taxpayer incurs expenses for

transporting job-required tools and material to and from work in addition to the non-deductible personal expense of commuting to and from such work.

Under the Supreme Court's "additional expenses" approach in Fausner, even though a taxpayer satisfies the "but for" test in Rev. Rul 63-100, the taxpayer is still not entitled to a transportation expense deduction unless it can be established that additional expenses were incurred because of the necessity of transporting work implements to and from work and the amount of such additional expenses can be accurately determined. On the other hand, even though a taxpayer is unable to satisfy the "but for" test in Rev. Rul. 63-100, a transportation expense deduction may still be allowable if the taxpayer is able to establish that such accurately determinable additional expenses were incurred because of the necessity of transporting work implements to and from work. Accordingly, the "but for" test, set forth in Rev. Rul. 63-100,

is no longer valid.

With respect to question (2) regarding the amount of a taxpayer's deduction, the principles set forth above apply in that the deduction does not depend on determining whether the mode of transportation that the taxpayer used in carrying work implements to and from work was different than the mode of transporation the taxpayer would have used to commute without such implements, but is dependent on the taxpayer's establishing that the expense in transporting the work implements to and from work were incurred in addition to otherwise nondeductible personal commuting expenses.

The Court in Fausner states that allocation of costs between personal and business expenses may be feasible in an "additional expense" situation. Therefore, the "all-or-nothing" position regarding the amount of a taxpayer's deduction in Rev. Rul. 63-100 is not within the plain meaning of the term "allocation" used by the Court in Fausner. Absent a showing of additional expenses incurred for transporting

work implements to and from work, a taxpayer's carrying of such items will not alter the nondeductibility of transporting expenses to and from work.

Therefore, in situations where a taxpayer can establish that additional expenses were incurred for transporting work implements to and from work, a reasonalbe and feasible method of allocation within the scope of the Supreme Court's opinion in Fausner would be to allow an ordinary and necessary business expense deduction for only the portion of the cost of transporting the work implements by the mode of transporting used which is in excess of cost of commuting by the same mode of transportation without the work implements. The fact that a taxpayer might have or would have used a less expensive mode of transportation if it had not been necessary to carrying the work implements is immaterial.

The following example illustrates the "feasible" allocation approach. A taxpayer commuted to and from work by public transportation before the taxpayer had to carry

necessary work implements. It cost $2 per day to commute to and from work. When it became necessary to carry the implements to and from work, it cost $3 per day to drive a car and an additional $5 per day to rent a trailer in which the implements were carried. The allowable deduction would be the $5 per day additional expense that the taxpayer incurred in renting the trailer to carry the work implements.

Rev. Rul. 56-25 is superseded and Rev. Rul. 63-100 is revoked. Pursuant to the authority contained in Section 7805(b) of the Code, the conclusion of this Revenue Ruling will not be applied to taxpayers who qualified under Rev. Rul. 63-100 for the deduction of transportation expenses paid or incurred prior to January 1, 1976.

REVENUE RULING 63-100

Where it is necessary for a musician to use his automobile to transport his musical instruments between his residence and his place of work because they are too bulky to be carried otherwise, and he would not use his automobile on such trips except for that reason, his transportation expenses are deductible under Section 162 of the Internal Revenue Code of 1954.

Such transportation expenses are ordinary and necessary expenses paid or incurred in carrying on his trade or business because they are occasioned primarily by the necessity for transporting bulky musical instruments even if such expenses would otherwise be nondeductible commuting expenses.

Whether transportation expenses are incurred primarily for business or personal reasons is a question of fact to be determined in each case.

Revenue Ruling 56-25, C.B. 1956-1, 152, states that expenses incurred by an employee in using his automobile for commuting between

his place of abode and his principal or regular place of work represent nondeductible personal expenses notwithstanding the fact that the automobile is also used to transport tools used by the employee in his work. That ruling is hereby modified to remove the implication that such transportation expenses would not be deductible even if the employee would not have used his automobile on such trips but for the necessity of taking his tools with him.

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No. 82-54

In the Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS McCABE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether any part of petitioner's commuting expense is deductible as a business expense under Section 162 of the Internal Revenue Code of 1954.

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DENNIS McCABE, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Tax Court is reported at 76 T.C. 876 (1981). The opinion of the court of appeals (Pet. App. 1-26) as amended (App., *infra*) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1982. The petition for a writ of certiorari was filed on July 9, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

§ 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or

incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagent under the circumstances) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, or property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, or possession which he represents in Congress shall be considered his home.

STATEMENT

Petitioner seeks review of the decision below holding that he is not entitled to deduct any part of his cost of driving to and from work under Section 162(a) of the Internal Revenue Code of 1954 (26 U.S.C.).

In 1976 petitioner was a New York City police officer and resided in Suffern, New York, a suburb west of the Hudson River. The most direct route between petitioner's home and his duty station in Manhattan was through New Jersey. New York City Police Department regulations then in effect required that police officers be armed whenever they were in the city, unless otherwise directed (Pet. App. 3, 17 n.1). Carrying a firearm without a permit is generally prohibited in New Jersey (Pet. App. 44-46 n.1). Although

petitioner never applied for a New Jersey gun permit, the court of appeals apparently assumed that he would not have been granted a permit if he had applied (Pet. App. 17 n.2). Throughout 1976, petitioner used his automobile as his exclusive means of commuting to his duty station (Pet. App. 4). He traveled entirely by New York roads (Pet. App. 17-18 n.3). If petitioner had driven to work through New Jersey or taken public transportation through New Jersey, his commuting expenses would have been lower (Pet. App. 4-5, 17-18 n.3).

On his 1976 return, petitioner claimed a $2,950 deduction, representing the cost of driving to and from work, including tolls. The Commissioner of Internal Revenue disallowed the deduction (Pet. App. 5).

Petitioner sought review in the Tax Court, limiting his claim to the difference between his actual commuting expenses and the cost of public transportation through New Jersey. The Tax Court accepted petitioner's claim that he would have taken public transportation through New Jersey, if he had not been carrying his service revolver (Pet. App. 38-39). The Tax Court found, however, "that petitioner's additional commuting expenses were not directly connected with the pursuit of his employer's business, but were principally the result of his decision to reside in a comparatively remote suburb adjacent to New Jersey" (Pet. App. 39). Accordingly, the court held that petitioner's commuting expenses did not qualify as ordinary and necessary business expenses under Section 162(a) of the Internal Revenue Code (Pet. App. 39-41).

The court of appeals concluded that the Tax Court's finding that petitioner's expenses were not "directly connected" with the pursuit of his business was not clearly erroneous (Pet. App. 12-15).[1] The court of appeals, therefore, affirmed the holding that no part of petitioner's commuting expenses was deductible as an ordinary and necessary business expense (*ibid.*). One judge dissented (Pet. App. 22-26).

ARGUMENT

The court of appeals correctly held that none of petitioner's commuting expenses was deductible under Section 162(a) of the Internal Revenue Code of 1954. The court's ruling is based on the Tax Court's finding that any incremental commuting costs incurred by petitioner were not directly connected with the pursuit of his business.

Section 162(a) allows a deduction for those expenses that are ordinary and necessary expenses incurred in carrying on any trade or business. Commuting expenses—those expenses incurred by a taxpayer in traveling between home and work—are not deductible under Section 162(a). They are "personal" nondeductible expenses under Section 262. Treasury Regulations on Income Tax (1954 Code), Sections 1.62-1(g), 1.162-2(e), 1.262-1(b)(5) (26 C.F.R.); see *Fausner* v. *Commissioner*, 413 U.S. 838, 839 (1973); *Commissioner* v. *Flowers*, 326 U.S. 465 (1946). Although commuting expenses are not deductible, expenses incurred for transporting tools or similar work-related materials to

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[1]The paragraph at Pet. App. 13-14, beginning with the words "We turn now" and ending with the citation to *United States* v. *Florida*, 482 F. 2d 205 (5th Cir. 1973) has been deleted. App., *infra*. The second sentence of the paragraph at Pet. App. 14-15, which begins with the words "Since the Record" and ends with the words "Tax Court" has also been deleted. App., *infra*.

and from work may be deductible as ordinary and necessary business expenses. See Rev. Rul. 75-380, 1975-2 Cum. Bull. 59 (Pet. App. 63-65); *Fausner* v. *Commissioner*, *supra*, 413 U.S. at 839 (dictum).

Contrary to petitioner's view, this Court's holding in *Fausner* is not controlling here. In *Fausner* an airline pilot carried a 40-pound flight-kit bag (containing manuals, maps, and other work-related materials) and a 20-pound overnight bag to and from work in his automobile. *Fausner* v. *Commissioner*, 472 F. 2d 561, 562 (5th Cir.), aff'd, 413 U.S. 838 (1973). The pilot would have driven even if he had not needed to carry the two bags. 413 U.S. at 838. "[O]n the theory that his automobile expenses were incurred to transport his flight bag and overnight bag and thus constituted ordinary and necessary business expenses" (*ibid.*), the pilot attempted to deduct his commuting expenses. The Tax Court disallowed the deduction, and the court of appeals affirmed. 30 T.C.M. (CCH) 1187 (1971), aff'd, 472 F. 2d 561 (5th Cir. 1973). This Court affirmed on the ground that nondeductible "personal" expenses for commuting are not transformed into deductible business expenses by the "happenstance" that "the taxpayer must carry incidentals of his occupation with him" (413 U.S. at 839). The Court observed that if "[a]dditional expenses * * * for transporting job-required tools and materials to and from work" (*ibid.*) were incurred, some allocation of costs between nondeductible "personal" commuting expenses and deductible "business" expenses for transporting the equipment might be "feasible" (*ibid.*). On the facts before it, however, the Court concluded there was no basis for any such allocation.

Under Section 162(a), an expense is a deductible business expense only if there is a "direct connection" between the expenditure and the carrying on of the trade or business of either the taxpayer or his employer. See *Commissioner* v.

Flowers, 326 U.S. 465, 470 (1946); *Daly* v. *Commissioner*, 662 F. 2d 253, 255 (4th Cir. 1981) (en banc). Whether such a direct connection exists is a question of fact. *Commissioner* v. *Flowers, supra*, 326 U.S. at 470. Thus, even if a portion of a taxpayer's commuting expense might be attributable to something other than simply the need to get to and from work, the additional expenses are deductible only if there is also a direct connection between the incremental expenditures and the taxpayer's trade or business. *Fausner* suggests no modification of this principle.

The Tax Court found that petitioner's added commuting costs were not directly connected with his business, but were instead principally caused by the location of his home.[2] New York City's requirement that petitioner be armed when in the city and New Jersey's supposed prohibition of his travel there while armed, affected petitioner's commuting expenses only because of the location of his home. The fact that petitioner lived where he did and incurred added commuting costs in no way furthered police department business. Petitioner's commuting expenses obviously were the product of (1) the location of his home, (2) the New Jersey law, *and* (3) the requirement of his employer that petitioner be armed whenever he was in New York City. As the court of appeals held, however, the Tax Court's finding that petitioner's increased commuting expenses were insufficiently connected to the furtherance of his employer's business was not clearly erroneous (Pet. App. 12-14).[3] Petitioner asserts

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[2]Petitioner incorrectly states (Pet. 21) that the Tax Court found as a fact that he incurred added commuting costs solely as a result of his employer's requirement that he be armed within New York City.

[3]We also note that petitioner never applied for a New Jersey gun permit, and introduced no evidence to show that such an application would have been futile. See Pet. App. 24. Nor is it clear that petitioner needed a permit to carry his gun to work through New Jersey. See Pet. App. 44-46 n.1.

that considering the location of a taxpayer's home a cause of his added commuting expenses will always preclude a deduction for "additional expenses" of transporting tools or similar equipment, since such expenses can always be reduced by moving closer to one's place of employment. The facts of this case, however, are unusual. Typically, the need to carry bulky tools or equipment to work requires a taxpayer to incur added expenses, regardless of where he lives or how far he lives from his job.[4] On such facts a court could conclude that the additional expenses were "directly connected" with the pursuit of the taxpayer's business, and not "principally" the result of the location of his home. In this case, however, petitioner would not have incurred *any* added expenses of commuting were it not for the location of his home. On these facts the Tax Court properly found that petitioner's added commuting costs were not sufficiently connected with his job.[5]

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[4]The location of the taxpayer's home might affect the amount of the added expenses. But the additional costs for transporting tools would not be affected at all by the location of the taxpayer's home, if, for example, a taxpayer rents a trailer at a flat rate to carry his tools. See Rev. Rul. 75-380, 1975-2 Cum. Bull. 59, 60.

[5]The suggestion in *Fausner* that "additional expenses" (413 U.S. at 839) "incurred for transporting job-required tools and material to and from work" may support deduction of part of a taxpayer's "commuting expenses" may eventually require amplification. The Tax Court (Pet. App. 42-43) explicitly declined to consider the possible application of that suggestion in this case because petitioner had failed to show that any increased commuting expenses were directly connected to his trade or business. The court of appeals properly affirmed on that basis (Pet. App. 12-16). Thus, this is an inappropriate vehicle for any necessary amplification of *Fausner*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1982

DOJ-1982-09

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1981

FILED

JUL 22 1982

SECOND CIRCUIT

No. 646

DENNIS McCABE,	•	
	•	
Petitioner-Appellant,	•	
	•	
-against-	•	Docket No.
	•	81-4175
COMMISSIONER OF INTERNAL REVENUE,	•	
	•	
	•	
Respondent-Appellee,	•	
	•	
	•	

Before: MESKILL and CARDOMONE, *Circuit Judges*, and HOLDEN, *District Judge*.*

Order Amending Opinion

It is hereby ORDERED that the majority opinion in the above case is amended as follows:

*Honorable James S. Holden, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

On page 7 the final paragraph commencing with the words "We turn now" found at lines 27 through 32, and continuing on page 8 lines 1 through 16 is eliminated.

On page 8 the second sentence of the first full paragraph commencing with the words "Since the record" found at lines 19 through 21 concluding with the words "the Tax Court." is eliminated.

In all other respects the majority opinion remains unchanged.

THOMAS J. MESKILL, U.S.C.J.

RICHARD J. CARDAMONE, U.S.C.J.

JAMES S. HOLDEN, U.S.D.J.